Supreme Court, U.S.
FILED
OCT 22 1992
OFFICE OF THE CLERK

No. 92-485

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

SEAN O'KEEFE, ACTING SECRETARY OF THE NAVY, ET AL.,

Petitioners

v.

ARLEN SPECTER, ET AL.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Respondents respectfully submit this Brief in Opposition to the Petition for a Writ of Certiorari.[1]

REASONS FOR DENYING THE PETITION

A. Considerations of Judicial Economy and Ripeness Support Denial of the Petition, Which Seeks Only Piecemeal Review of a Matter Remanded to the District Court for Decision on the Merits

Petitioners expressly "do *not* seek plenary review" of the merits of the Third Circuit's decision "*at this time*". (Pet. at 10-11 n. 3) (emphasis added). *See also* Pet. at 8 ("we do not believe that plenary review is necessary *at this stage* of the proceedings") (emphasis added). Instead, they ask *only* that the Third Circuit be ordered to reconsider its decision – which resulted in remand of the case to the district court for adjudication on the merits – in light of the subsequently decided *Franklin v. Massachusetts,* 112 S. Ct. 2767 (1992). Because petitioners will likely seek plenary review of the Third Circuit's decision at some future time, this interlocutory petition should be denied to prevent delay and disruption of these injunctive proceedings, avoid fragmented and repetitive appeals and ensure an efficient and orderly appellate process. *See, e.g., Brotherhood of Locomotive Firemen and Enginemen v. Bangor & A.R. Co.,* 389 U.S.

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1. Respondents are United States Senators Arlen Specter, Harris Wofford, Bill Bradley and Frank R. Lautenberg; United States Representatives Curt Weldon, Thomas Foglietta, Robert E. Andrews, R. Lawrence Coughlin, Peter H. Kostmayer and Robert A. Borski; the Commonwealth of Pennsylvania and its Governor Robert P. Casey and Attorney General Ernest D. Preate, Jr.; the State of New Jersey and its Governor James J. Florio and Attorney General Robert J. Del Tufo; the State of Delaware and its Governor Michael N. Castle; the City of Philadelphia; the International Federation of Professional and Technical Engineers, Local 3; the Metal Trades Council, Local 687 Machinists; Planners Estimators Progressman & Schedulers Union, Local No. 2; and Union representatives William F. Reil, Howard J. Landry and Ronald Warrington.

327, 328 (1967) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for a writ of certiorari is denied.").

B. Because Petitioners' Actions Were "Final" Within the Meaning of *Franklin*, There Is No Reason for the Third Circuit to Reconsider Its Decision, Which Is Entirely Consistent with This Court's 30-Year Precedent Concerning Judicial Review of Agency Action

The Defense Base Closure and Realignment Act of 1990 (the "Act") was expressly enacted to provide a "*fair process*" for closure and realignment of United States military installations. §2901(b) (emphasis added). Petitioners made a mockery of this congressional mandate by predetermining, on an intentionally incomplete administrative record and without required public hearings, that the Philadelphia Naval Shipyard ("Shipyard") should be closed, resulting in the loss of nearly 50,000 jobs. In particular:

- The Act requires the Secretary of Defense to "consider all military installations . . . equally without regard to whether the installation has been previously considered or proposed for closure." §2903(c)(3). Nevertheless, the Navy compiled a "stealth list" of base closings from a prior base closure list and attempted to manipulate the base closure criteria to close the Shipyard. When those efforts failed, the Navy excluded all shipyards other than Philadelphia from consideration to justify its predetermination that Philadelphia should be closed.

- The Act requires the Secretary of Defense to "make available to the [Defense Base Closure and Realignment] Commission and the Comptroller General of the United States all information used by the Department in making its recommendations to the Commission for closures and realignments."

§2903(c)(4); *see also* §2903(d)(5). Nevertheless, the Navy made a conscious decision to disable the General Accounting Office ("GAO") from performing its statutory duties by withholding key information. The GAO concluded that it could not even analyze the Navy's closure recommendations because of this lack of documentation.

• The Act requires the Commission to conduct public hearings on the recommendations for closure and realignment. §2903(d)(1). Nevertheless, all information favorable to the Shipyard was suppressed from the public. The Commission also conducted closed-door meetings with the Navy after the close of public hearings for the purpose of gathering information critical to its decision to close the Shipyard.

The Third Circuit's holding that there is federal jurisdiction to review petitioners' blatant failure to comply with the procedural mandates of the Act is totally consistent with this Court's established precedent governing judicial review of agency action under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq. See, e.g., Board of Governors of Federal Reserve System of U.S. v. MCorp Financial, Inc.,* 112 S. Ct. 459, 460 (1991); *Bowen v. Michigan Academy of Family Physicians,* 476 U.S. 667, 670-71 (1986); *Abbott Laboratories v. Gardner,* 387 U.S. 136, 140-41 (1967); *Leedom v. Kyne,* 358 U.S. 184, 190 (1958); *see also Franklin,* 112 S. Ct. at 2783-86 (Stevens, J., concurring). As emphasized in *Bowen, supra*, 476 U.S. at 670-71:

> "We begin with the *strong presumption* that Congress intends judicial review of administrative action. From the beginning 'our cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was

> the purpose of Congress.' [citations omitted]. In *Marbury v. Madison*, 1 Cranch 136, 163, 5 U.S. 137, 163, 2 L. Ed. 60 (1803), a case itself involving review of executive action, Chief Justice Marshall insisted that '[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws.'
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> * * *
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> Committees of both Houses of Congress have endorsed this view. In undertaking the comprehensive rethinking of the place of administrative agencies in a regime of separate and divided powers that culminated in the passage of the [APA], the Senate Committee on the Judiciary remarked:
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> '*Very rarely* do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be *blank checks* drawn to the credit of some administrative officer or board.' S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)." (Pet. App. at 13a-14a) (emphasis in original).

After scrutinizing the language and legislative history of the Act, the very purpose of which is to provide a "fair process" for base closures, the Third Circuit concluded that Congress did not intend to immunize petitioners' patently unfair process from federal court review. (Pet. App. at 4a-7a, 26a-27a).

While virtually conceding the correctness of the Third Circuit's decision on the merits, petitioners nevertheless contend that their flagrant *procedural* violations of the Act, which indisputably have been finally completed, are totally shielded from review because, under *Franklin*, their discretionary administrative decisionmaking is not a "final" agency action. Petitioners,

however, cannot take refuge in *Franklin* because it is factually and legally inapposite.

First, plaintiffs in *Franklin* challenged decisions made by both the President and the Secretary of Commerce. This Court held that under the particular statutes involved, it was the decision of the President, not the Secretary, that was "final" for purposes of judicial review. 112 S. Ct. 2773, *citing* 5 U.S.C. §704. In complete contrast to *Franklin*, where the President was actually joined as a party defendant and relief was entered against him, *id.* at 2770, respondents here do *not* seek review of the merits of any presidential decision or exercise of discretion, nor do they seek any relief from or involving the President, who is not a party.[2] Moreover, respondents do *not* challenge the exercise of the agencies' discretion under the APA, but only the *integrity of the process* by which petitioners arrived at their decision to close the Shipyard. There is no other procedure for reviewing the agencies' compliance with the procedural mandates of Congress.

Second, the statute in *Franklin* imposed no procedural requirements on the Secretary of Commerce, and the Secretary's report to the President carried "no direct consequences" and had "no direct effect". *Id.* at 2774. In the present case, however, *only* the agencies are subject to the procedural requirements which are the raison d'etre of the Act,[3] and whether they have complied with

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2. Petitioners concede this at page 5 of their Petition: "Respondents asked the district court . . . to enjoin the *Department of Defense* 'from taking any action based upon the list of closure and realignment proposals submitted by the *Secretary of the Navy*' ". (Emphasis added).

3. In *Franklin*, the Secretary's report to the President was deemed an "unusual candidate" for agency action because it was not promulgated to the public in the Federal Register and no official administrative record was generated. 112 S. Ct. at 2773. By contrast, in the present case, the agencies' proceedings are required to be made public and public hearings are mandated. §§2902(e)(2)(A), 2903(d)(1).

those critical requirements directly and materially affects the President's decision. As the Third Circuit emphasized:

> "[T]he fact that some aspects of a decisionmaking process are determined to be not subject to judicial review does not absolve the courts from the responsibility of determining whether a clear congressional intention to preclude review exists with respect to other aspects of that same process. *There are a number of statutes, for example, in which Congress has clearly intended that there be no review of the ultimate exercise of the agency's discretion, but, at the same time, has anticipated judicial review of compliance with its procedural mandates* concerning the process leading up to the ultimate discretionary decision.
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> * * *
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> In this context, it is important to note that while Congress did not intend courts to second-guess the Commander-in-Chief, it did intend to establish exclusive means for closure of domestic bases. §2909(a). With two exceptions, Congress intended that domestic bases be closed *only* pursuant to an exercise of presidential discretion *informed by recommendations of the nation's military establishment and an independent commission based on a common and disclosed (1) appraisal of military need, (2) set of criteria for closing, and (3) data base.* Congress did not simply delegate this kind of decision to the President and leave to his judgment what advice and data he would solicit. Rather, it established a *specific procedure* that would ensure balanced and informed advice to be considered by the President and by Congress before the executive and legislative judgments were made." (Pet. App. at 19a-20a) (footnote omitted; emphasis added and in original).

. Under the Act, no procedural requirements are imposed upon the President, who is given only a scant 15 days to review the Commission's report. His sole function is to accept or reject the closure recommendations. *The President relies exclusively on the recommendations of the petitioner agencies*, and the legitimacy of those recommendations hinges entirely on the agencies' adherence to the mandated procedural safeguards. For the base closure process to function as Congress intended, and for the President's decision to be responsible, the Act's procedural mandates must be complied with at the *agency* level. Therefore, the agencies' actions with regard to compliance with procedural mandates must be deemed "final" for purposes of judicial review. *See Franklin*, 112 S. Ct. at 2773 ("[t]he core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties").

Petitioners' strained and hypertechnical interpretation of *Franklin* would place them above the law. Denial of judicial review in this case would not only thwart the will of Congress as expressed in the Act and its legislative history, but would effectively issue blank checks to the bureaucracy in a wide range of future cases to disclaim any accountability to Congress, the courts and the public. Such an unsalutary result could not have been intended by this Court in *Franklin*. Indeed, to apply *Franklin* in the sweeping manner urged by petitioners would eviscerate the 30 years of pre-*Franklin* precedent sustaining judicial review of agency action.

Consistent with the principle that statutes should only "very rarely" be interpreted to withhold judicial review,[4] the court in *Colorado Environmental Coalition v. Lujan*, ____ F. Supp. ____, 1992 WL 231020 (D. Colo., Sept. 14, 1992), recently declined to read *Franklin* as retreating from or overturning this Court's prior judicial review decisions, which are firmly embedded in

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4. *See Bowen*, *supra*, 476 U.S. at 670-71.

the fabric of American jurisprudence. There, plaintiffs alleged that the Secretary of the Interior violated the procedural requirements of the National Environmental Policy Act ("NEPA") in recommending to the President areas that should receive wilderness protection. Although defendant argued that under *Franklin* there was no "final" agency action because the President made the ultimate decision, the court held that the agency's actions were final and reviewable since plaintiffs sought no relief from the President and there was no other procedure for reviewing the agency's conduct:

> "Once the recommendations are sent to the President based on inadequate procedures in violation of NEPA, there will be no opportunity for any other recommendation by the Secretary as to the wilderness study areas in question. Therefore, the court concludes that . . . the challenged agency action is final.
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> * * *
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> Defendant argues that there is no final agency action in this case until the President makes and transmits his recommendations for wilderness designation to Congress, therefore, the action complained of is not reviewable under the APA, citing *Franklin v. Massachusetts*. . . . The court disagrees. The Plaintiffs here seek no relief from the President. The challenged action is the Secretary's decision not to prepare a SEIS pursuant to NEPA. . . . The court concludes that the Secretary's decision . . . is final agency action subject to review under the APA."

Virtually identical considerations inexorably compel the same conclusion here. Under the Act, neither the President nor Congress is given the responsibility of ensuring a fair process. *That paramount and expressly mandated duty is imposed directly and solely upon petitioners, and it is the conduct of petitioners — not that of the President — that respondents challenge.* If

the federal courts are prevented from reviewing petitioners' abject failure to comply with the procedural requirements of the Act, *no review of that unlawful conduct will ever be possible.* Because the purpose of the Act is to ensure a "fair process" for base closures, the only method of ensuring the fulfillment of Congress' mandate is to permit judicial review of the actions of the *only* governmental body charged with procedural obligations.[5]

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5. The recent dismissal by a district court of another base closure lawsuit in light of *Franklin* was clearly erroneous. *See Cohen v. Rice*, ____ F. Supp. ____, 1992 WL 246574 (D. Me., Sept. 18, 1992). The *Cohen* court only briefly and superficially focused on the critical distinction between procedural and substantive challenges to agency actions under the Act. Moreover, although it admitted there was "no clear evidence of congressional intent to preclude all judicial review of actions taken pursuant to the . . . Act," it simply ignored this Court's mandate that judicial review *must* be permitted in such circumstances. The *Cohen* court also disregarded the undesirable consequences of its decision, which will encourage agencies to flout congressional mandates and place themselves beyond the reach of law.

CONCLUSION

For each of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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